SUPREME COURT, U. S.

FILED
JUN 10 1969
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IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1969

NO. [redacted]218

LOUIS VERNELL,

Petitioner,

vs.

STATE OF FLORIDA, ex rel., RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOUIS VERNELL, Petitioner
In Properi Personam

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CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Title 28 U.S.C. Section 1257(3)

"By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Rule 19(1)(a) Rules of Supreme Court of the United States

"Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Florida Statutes Section 38.22

"Every court may punish contempts against it, whether such contempts be direct, indirect, or constructive, and in any such proceeding

the court shall proceed to hear and determine all questions of law and fact, but the punishment imposed by a justice of the peace shall not exceed twenty dollars fine, or twenty-four hours' imprisonment."

Rule 4.5(c)(6) Florida Appellate Rules

"From District Court to Supreme Court. Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision.

The petition for certiorari under this rule shall be filed in the Supreme Court within 30 days from the rendition of the order, decision or judgment of the district court of appeal. The petition shall set forth briefly and clearly the grounds for invoking jurisdiction of the Supreme Court and the facts relied upon for the issuance of the writ. Unless the district court shall otherwise direct

for good cause shown after notice and hearing, a petition for certiorari filed in the Supreme Court within 15 days from the date of the filing of the order, decision or judgment sought to be reviewed or within 15 days from the date of the disposition of a petition for rehearing shall automatically stay further proceedings in the district court and the trial court until the disposition of said petition by the Supreme Court; otherwise such petition for certiorari shall operate as a stay of such proceedings only upon the order of the Supreme Court or the Chief Justice after due notice to the adverse party."* * *

IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1969

No._____

LOUIS VERNELL,

Petitioner,

vs.

STATE OF FLORIDA, ex rel.,
RICHARD E. GERSTEIN, State
Attorney for the Eleventh
Judicial Circuit of Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

Petitioner LOUIS VERNELL prays that a Writ of Certiorari issue to review the opinion of the District Court of Appeal of Florida, Third District, dated July 2, 1968, Certiorari being denied by the Supreme Court of Florida February 18, 1969.

OPINIONS BELOW

The Petitioner was adjudged gulity of indirect criminal contempt in the Criminal Court of Record in and for Dade County, Florida on June 2[illegible], 1967. Upon appeal from such judgement to the District Court of Appeal of Florida, Third District, such court affirmed the same and rendered its opinion on July 2, 1968, the same being reported in 212 So.2d at page 11, (APPENDIX B).

A review of such opinion and judgement was sought by Petitioner in the Supreme Court of Florida by Petition for Writ of Certiorari, with the same being thereafter denied by such court on February 18, 1969, (APPENDIX B).

JURISDICTION

The jurisdiction of this court is invoked under Title 28 U.S.C. Section 1257(3). Jurisdiction is also invoked under Rule 19(1)(a) of the Rules of the Supreme Court of the United States, because the State Court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court:

QUESTIONS PRESENTED

I

THE FAILURE TO GRANT PETITIONER'S REQUEST FOR A TRIAL BY JURY IN

INDIRECT CRIMINAL CONTEMPT PROCEEDINGS, UNDER THE CIRCUMSTANCES PRESENTED, CONSTITUTES A DENIAL OF DUE PROCESS AND A VIOLATION OF PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II

WHERE PETITIONER'S ADJUDICATION OF GUILT OF INDIRECT CRIMINAL CONTEMPT IS DEVOID OF EVIDENTIARY SUPPORT, THE SAME IS UNCONSTITUTIONAL AND CONSTITUTES A DENIAL OF DUE PROCESS AND A VIOLATION OF PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

The Petitioner, LOUIS VERNELL, a licensed and practicing attorney in the State of Florida was charged with indirect criminal contempt allegedly occasioned in the course of his representation of three clients jointly charged with a major offense carrying possible life sentences.

Six days before the commencement of the clients' trial, i.e._ April 27, 1967, the trial judge of the Criminal Court of Record of Dade County granted a continuance in the trial of such cause for and among other reasons, the lack of time and opportunity for the

preparation of a defense. Indeed, one of such client-defendants had not even been arraigned as of such date.

On May 1, 1967 (two days before the commencement of such trial), the trial judge announced that such cause involving Petitioner's clients would be tried the very next day, but after reconsideration, set trial for May 3, 1967.

On May 2, 1967, Petitioner filed in the District Court of Appeal, Third District, a Suggestion for Writ of Prohibition seeking to prevent the trial of his clients, urging the extreme prejudice which would be resultant to them in such "rush to trial" type proceedings and the consequent denial of their respective rights to due process. Such Suggestion was summarily denied by the District Court on the same day, i.e. May 2, 1967.

On May 3, 1967, and prior to the commencement of the criminal trial of his clients, the Petitioner caused to be filed in the Supreme Court of Florida a Petition for Writ of Certiorari directed to the ruling of the District Court denying his application for prohibition; such Petition was filed pursuant to Rule 4.5c of the Florida Appellate Rules which provided for an automatic stay of proceedings in the District Court and the trial court where such Petition was filed within 15 days from the date of the opinion or decision sought to be reviewed.

Appropriate announcement as to the filing

of such Petition in the Supreme Court was made by Petitioner prior to the commencement of trial proceedings on May 3, 1967, but the trial judge refused to suspend or otherwise terminate the same.

On May 4, 1967, a Motion was filed by Petitioner before the Supreme Court of Florida seeking a formal order from the Supreme Court staying the trial proceedings then pending in the Criminal Court of Record. Both the Honorable Sid White, Clerk of the Supreme Court of Florida, and your Petitioner were of the opinion, judgment and belief that Petitioner's clients were entitled to such stay of trial proceedings, based upon the appropriate Florida Appellate Rule, and that a formal order would accordingly be entered upon proper presentment. Accordingly, Petitioner duly appeared before the Supreme Court of Florida at 9:00 a.m. on May 5, 1967, for purposes of presenting and obtaining such order of stay. Despite the clear language of the applicable Appellate Rule and previous case precedent which provided for a stay, the Supreme Court of Florida refused to enter such formal order as requested.

In so appearing before the Supreme Court on the morning of May 5, 1967, the Petitioner was accordingly unable to at the same time appear before the Honorable Paul Baker, presiding Judge of the Criminal Court of Record to continue with the voir dire examination of prospective jurors incident to the trial of his respective clients.

Although Petitioner requested a two-hour

continuance during the afternoon of May 4, 1967 while such voir dire examination was being conducted so that he may obtain the services of co-counsel, such request was denied and accordingly Petitioner was sole counsel for his three clients on each of the subject dates.

Upon instructions of your Petitioner, Petitioner's secretary notified and advised the trial judge by both telephone and personal appearance before him during the early morning of May 5, 1967, to explain his absence. Upon denial of Petitioner's Motion before the Supreme Court of Florida, he forthwith returned to Dade County and resumed the defense of his clients' cause in trial proceedings conducted on May 6, 1967. On such occasion Petitioner extended his fervent and sincere apologies to the trial judge for any inconvenience occasioned as a result of his absence the prior day. In order to otherwise and further dispel any inference of disrespect to the trial judge, Petitioner at such time proffered that his appearance before the Supreme Court was resultant from Petitioner's considered judgment and opinion in the behalf of his clients that such contemplated order of stay was essential and that he believed the same would be granted; such belief being occasioned upon his own personal conversation with the Clerk of the Supreme Court of Florida, as well as Petitioner's reliance upon Rule 4.5c of the Florida Appellate Rules and previous case precedent.

The trial judge, however, subsequently directed the issuance of a citation and rule to show cause against Petitioner urging as one of

two grounds therefore Petitioner's failure to appear before him on May 5, 1967, and Petitioner's further alleged failure to communicate with the court or otherwise explain or justify Petitioner's actions.

The other ground of such rule to show cause urged that the Petitioner violated a purported order which directed counsel not to communicate with the jurors after the conclusion of the subject trial and that purportedly, the Petitioner did "communicate with and harass one of the aforesaid jurors in direct violation" of such order.

In his sworn response to such rule, the Petitioner not only vehemently denied that he had at any time harassed or otherwise conducted himself improperly towards a juror, but further denied the entry of any order by the trial court precluding appropriate and necessary contact after the conclusion of trial proceedings.

Petitioner otherwise and further denied both the intention to commit as well as the commission of any acts or course of conduct on his part which intended, or otherwise evidenced any disrespect to the trial court.

Prior to any hearing upon the issues so joined, the Petitioner timely requested trial by jury. Such request was however denied by the same trial judge who not only initiated the charges against Petitioner, but subsequently determined the same with an adjudication of guilt being entered as against your Petitioner.

During the contempt hearing as held before such trial judge, not a single word of testimony or any evidentiary matter whatsoever was either proffered or presented by the Respondent in support of the charges circumscribed by the rule issued, nor does the record anywhere reflect the entry of any order by the trial court which was either violated, or alleged to have been violated by the Petitioner.

Indeed, the only evidence presented in the cause was that proffered by the Petitioner and three witnesses testifying in his behalf, with the same being proffered in total refutation of any claimed or alleged contemptuous action on the part of Petitioner.

The trial judge, notwithstanding, entered an adjudication of guilt against Petitioner and directed the payment of a fine of $500.00 or sixty (60) days in jail at hard labor.

On appellate review of such adjudication, the District Court of Appeal of Florida, Third District, determined that Petitioner was not entitled to a trial by jury, even though there was existent at the time of its decision a criminal rule of procedure which prescribed and provided for such right to trial by jury (Rule 1.840(a)(4). The District Court accordingly determined that such rule, becoming effective January 1, 1968, could not apply to the contempt proceedings which took place against Petitioner on June 27, 1967.

In sustaining the subject adjudication, the

District Court erroneously determined that the Petitioner "did not communicate with the court or furnish explanation of his absence". In so finding, such court completly rejected the uncontradicted testimony of both Petitioner and Petitioner's secretary whose testimony evidenced that on at least three separate occasions the trial court was advised as to both the necessity and the presence of Petitioner before the Supreme Court of Florida at the time of his alleged absence before the trial court.

Likewise, the District Court further and erroneously determined that an "order was made enjoining counsel from communicating with the jurors" at the conclusion of the subject trial, for nowhere does such a purported order appear in the record of either this or any other related cause.

Significantly, the only purported "contact" as evidenced in the record was occasioned through a note left at the home of one of the jurors after the trial of Petitioner's client had been concluded; such note specifically stating that the juror had the right not to talk to Petitioner if he so chose.

Yet, the record goes further to establish that the sole reason for even such minimal contact was a bona fide effort to ascertain whether the trial jury had either heard or considered arguments or other matters conducted in the courtroom which were required to be heard out of the presence of the jury. Such inquiry being necessitated because of a

discovery made after the jury's verdict was returned that the door which separated the main courtroom from the jurors' room was so constructed as to allow a considerable space between the floor and the door which permitted one to hear activities and conversations in the courtroom from the adjoining jurors' room.

It is accordingly submitted that the record is totally absent of any evidentiary support to sustain the charges made against the Petitioner, and to the contrary, the same fully serves to dispel any impropriety or contemptuous action or conduct on the part of Petitioner towards the trial court.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I

THE FAILURE TO GRANT PETITIONER'S REQUEST FOR A TRIAL BY JURY IN INDIRECT CRIMINAL CONTEMPT PROCEEDINGS, UNDER THE CIRCUMSTANCES PRESENTED, CONSTITUTES A DENIAL OF DUE PROCESS AND A VIOLATION OF PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As noted in the record and summarized in the "Statement of the Case", supra, the Honorable Paul Baker, Judge of the Criminal Court of Record of Dade County, Florida purportedly

entered both of the orders which Petitioner is accused of violating (neither of such orders being a part of the record). The same trial judge precipitated and caused the initiation of the charges of indirect criminal contempt being brought against Petitioner. Likewise, it was this same trial judge who heard and determined the contempt charges against Petitioner and who subsequently entered an adjudication of guilt in the cause, after first denying Petitioner's request and demand for trial by jury.

It is significant to note that Section 38.22 of the Florida Statutes, which establishes the offense of indirect criminal contempt, is silent with respect to both the propriety and right of a jury trial, as well as to the extent and nature of any punishment which could be imposed for violation of such Florida Statute.

Indeed, Florida case precedent suggests that the only limitation upon the length of imprisonment or other penalty which could be imposed upon conviction of criminal contempt is that which may come within the purview of cruel and inhuman punishment; such standard being applied in Thiede v. State, (Fla.App.1966) 189 So.2d 490 where the accused was sentenced to a term of five (5) years imprisonment upon conviction of indirect criminal contempt.

In Duncan v. Louisiana, ___U.S.___, 20 L.Ed. 2d 491, 88 S.Ct.___, this Honorable Court extended the application of the Sixth Amendment to the Constitution of the United States and its requirement of a jury trial in criminal cases to the state courts. Although rejecting

the necessity of a jury trial in "so-called petty offenses" this court nonetheless reaffirmed the holding as enunciated in the case District of Columbia v. Clawans, 300 U.S. 617, 81 L.Ed. 843, 57 S.Ct. 660 (1937), wherein the court looked to the term authorized for punishment, rather than the term of punishment imposed in determining whether or not "The offense was not one for which the Constitution assured trial by jury." This court in Duncan specifically stated as follows:

> "But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment."

In the instant cause, the offense of indirect criminal contempt under the existing Florida Statute is shown to have not only authorized but warranted the imposition of a five (5) year term of imprisonment, Thiede v. State, supra. Innumerable other cases reflect the authorized imposition of imprisonment terms of one or more years.

In Bloom v. Illinois, ___U.S.___, 20 L.Ed 2d 522, 88 S.Ct. ___(1968), the right to a jury trial was further extended to cases of criminal contempt which the court recognized as "A crime in the ordinary sense."

While Petitioner concedes that the punishment imposed upon him by the trial court, i.e.

a fine of $500.00 or sixty (60) days imprisonment at hard labor does not come within the purview of the extent of punishment which the court considers necessary in Bloom to require a jury trial, nonetheless to the Petitioner, as a practicing attorney, even the adjudication of guilt of criminal contempt elevates the charge from that of a "petty offense". Indeed, and as noted in Petitioner's own case, even his application for admission to practice before this Honorable Court was defered pending final adjudication of the criminal contempt proceedings pending against him.

It is accordingly submitted that the onus of an attorney being convicted of criminal contempt and consequently, contemptuous conduct towards the court, strikes at the very essence of his professional integrity and reputation not only before the courts wherein Petitioner may be privileged to practice, but also serves to undermine the confidence and respect reposed in him by his clients and fellow practitioners.

Ergo, under the circumstances presented in the case at bar, the denial to Petitioner of a jury trial and a consequent determination of the charges of criminal contempt as made against him by the same trial judge who precipitated and initiated the same are submitted as being violative of Petitioner's rights under both the Sixth and Fourteenth Amendments to the Constitution of the United States.

II

WHERE PETITIONER'S ADJUDICATION OF GUILT OF INDIRECT CRIMINAL CONTEMPT IS DEVOID OF EVIDENTIARY SUPPORT, THE SAME IS UNCONSTITUTIONAL AND CONSTITUTES A DENIAL OF DUE PROCESS AND A VIOLATION OF PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner respectfully submits that a perusal of the record in the within cause would fully manifest the complete absence of any evidentiary support whatsoever to sustain the charges of criminal contempt as lodged against Petitioner in the case at bar. Indeed, the Respondent offered not a single witness, nor word of testimony or exhibit, to sustain the adjudication of guilt of criminal contempt as entered against Petitioner.

In Thompson v. Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, this Honorable Court promulgated as a very basic and fundamental concept of due process the following principle:

> "Just as conviction upon a charge not made would be sheer denial of due process, so is it a violation of due process to convict and punish a man without evidence of his guilt."

Such principle was reaffirmed by this Honorable Court in Johnson v. Florida, 391 U.S. 596,

88 S.Ct. 1713 (1968) and again in Gregory v. City of Chicago, ___U.S.___, 89 S.Ct. 946. In the Gregory case, this Honorable Court, speaking through Chief Justice Warren held:

> "As we said in Garner v. Louisiana, 368 U.S. 157, 164, 82 S.Ct. 248, 251, 7 L.Ed.2d 207 (1961):
>
> It is as much a denial of due process to send an accused to prison following a conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction.",

In the case at bar the only evidence whatsoever adduced in the cause was submitted by Petitioner and his witnesses which fully served to dispel even an inference of any disrespectful or contemptuous conduct towards the trial court. Needless to state, the responsibility for proving the charges as laid rests solely upon the prosecuting body, not upon the accused to prove his innocence.

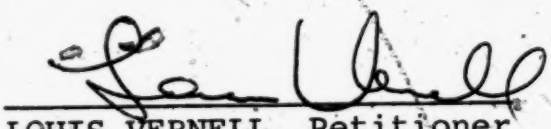
It is accordingly submitted that, there being no evidence in the cause submitted by Respondent, or otherwise appearing in the record in support of the adjudication of guilt, such judgment should be remanded.

CONCLUSION

Under the circumstances presented in the within cause, the denial of Petitioner's request

for a trial by jury is violative of his constitutional rights as provided in the Sixth and Fourteenth Amendments to the Constitution of the United States. Clearly, the adjudication of guilt of criminal contempt as entered against Petitioner is totally lacking in any evidentiary support whatsoever and accordingly and otherwise constitutes a denial of due process.

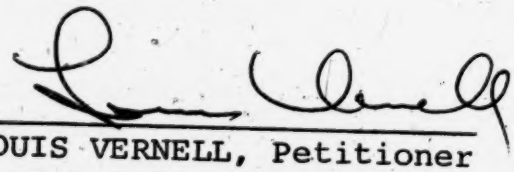
Petitioner therefore prays that this Honorable Court will grant a Petition for Writ of Certiorari in the within cause.



LOUIS VERNELL, Petitioner
In Properi Personam

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari to the Office of the Attorney General at 1350 N.W. 12th Avenue, Miami, Florida, this 15 day of May, 1969.



LOUIS VERNELL, Petitioner
In Properi Personam

DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

January Term, A.D. 1968

LOUIS VERNELL vs. STATE OF FLORIDA, ex rel., RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida.

CASE NO. 67-619

Opinion filed July 2, 1968

An Appeal from the Criminal Court of Record for Dade County, Paul Baker, Judge.

Before CHARLES CARROLL, C.J., and PEARSON and HENDRY, JJ.

CHARLES CARROLL, Chief Judge.

The appellant, a practicing attorney, was adjudged guilty of indirect criminal contempt in the criminal court of record of Dade County. The penalty imposed was a fine of $500. On this appeal therefrom he presents five points.

The first contention is that the rule to show cause was improvidently issued because it was not predicated on an affidavit of one having knowledge of the alleged facts. Secondly, appellant contends he was entitled to a jury trial, and was denied that right.

APPENDIX A

Thirdly, it was argued that the orders of the court which he was alleged to have violated were not lawful orders. And the fourth is a contention that the judgment in contempt represented an abuse of discretion of the court.

The requirement that a rule to show cause for indirect contempt should be predicated on affidavit of one having knowledge of the alleged facts (Ex parte Biggers, 85 Fla. 322, 95 So. 763; Phillips v. State, Fla.App.1962, 147 So.2d 163) is sufficiently met by the filing of a sworn petition of an assistant state attorney setting forth facts upon the basis of which the rule to show cause is issued. Ex parte Crews, 127 Fla. 381, 173 So. 275; Ex parte Maniscalco, 153 Fla. 666, 15 So.2d 445.

The contention of appellant that he was entitled to have the matter heard before a jury is without merit. Rule 1.840(a)(4)CrPR, providing for trial by jury of issues of fact in indirect criminal contempt proceedings, became effective January 1, 1968. That rule did not apply to this cause, wherein the hearing or trial took place on June 27, 1967. Under the law then in effect such proceedings properly were heard before the court without a jury. § 38.22 Fla.Stat., F.S.A. Baumgartner v. Joughin, 105 Fla. 335, 141 So. 185, 188; Ballenger v. State, Fla.App.1962, 144 So.2d 68, 70.

The orders alleged to have been violated were lawful orders of the trial court. One was an order to the attorney for the defendant to be present at the resumption of a cause

after a called recess. The other was an order of the court made at the conclusion of the trial enjoining counsel from speaking with the jurors unless the court should so authorize by order. Those were orders properly made in the course of the administration of the cause by the trial court.

As to the first order, the record reveals that during the voir dire for selection of a jury in a trial in which the appellant represented the defendant, the court recessed at 5:30 P.M. and ordered counsel to be present to resume the cause at 9:30 A.M. the following day; that the appellant did not appear as directed and did not communicate with the court or furnish explanation of his absence.

Some weeks later the trial was held, and at the conclusion thereof the order was made enjoining counsel from communicating with the jurors. Thereafter, without having obtained permission of the court, the appellant contacted one of the jurors who had served in the case, by leaving a written message for him and by telephoning him, admittedly for the purpose of obtaining evidentiary support for a motion for new trial.

The judgment in contempt did not present an abuse of discretion on the part of the trial court. Due process was observed. The respondent in contempt was sufficiently informed of the basis of the charge by the petition and rule to show cause. He was allowed ample time to respond thereto. The suggestion was filed

and the rule issued on May 31. The return date fixed was June 13. A motion of the respondent for continuance was granted. Respondent filed an answer and a motion to discharge the rule, and the matter came on for hearing before the court on June 27. Having in mind the requirement that in a proceeding for indirect criminal contempt the contemnor is presumed to be innocent until proved guilty beyond a reasonable doubt (Demetree v. State, Fla.1956, 89 So.2d 598,502), we have reviewed the record and are of the opinion that the judgment of the trial court has adequate support in the evidence.

No reversible error having been made to appear, the judgment appealed from is affirmed.

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1969

LOUIS VERNELL vs. STATE OF FLORIDA,
ex rel., RICHARD E. GERSTEIN, etc.

CASE NO. 37.875

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

APPENDIX B